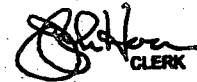


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED

NOV 14 2016


CLERK

PAUL A. ROSBERG,

Plaintiff,

vs.

DR. BOYD and MR. DOWNING,

Defendants.

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CIV 15-4076

ORDER

Plaintiff, Paul A. Rosberg, filed this pro se lawsuit pursuant to 42 U.S.C. § 1983. He named the United States of America, J.S. Willis, Dr. Boyd, and Mr. Downing as defendants. Rosberg's complaint raised numerous claims for violations of his rights under the Eighth Amendment. Docket 1. The Court dismissed defendants Eric Holder, the United States, and Warden Willis. Docket 5 at 5. The Court found that Rosberg stated a claim that prison staff was deliberately indifferent to his medical needs and ordered Rosberg fill out summonses in order for defendants to be served. *Id.* Rosberg failed to comply with this order.

The Court then ordered Rosberg to give notice if he wished to continue his case. On March 31, 2016, Rosberg filed a motion to extend the time to serve defendants. Docket 11. The Court granted this motion and ordered Rosberg to serve defendants no later than May 20, 2016. Docket 13. Rosberg filed an affidavit stating that he sent the summons and complaint to defendants by

mail on May 13, 2016. Docket 15. He also filed documents showing that defendants received his summons and complaint in the mail. Docket 16.

The record reflects that Rosberg improperly served defendants. “Service may be made by mail, but such service is only effective when the recipient signs an enclosed waiver and the waiver is subsequently returned within twenty days of the mailing.” *Montgomery v. Pinnacle Credit Servs.*, No. CIV. 13-2839 JNE/FLN, 2014 WL 3734251, at *2 (D. Minn. July 28, 2014) (citing *Hajjiri v. First Minnesota Sav. Bank F.S.B.*, 25 F.3d 677, 678 (8th Cir. 1994) (holding that the “only way mail service can be acknowledged under the federal rule . . . is by return of the enclosed acknowledgment form within twenty days of the mailing”). “[U]nless a defendant voluntarily appears or waives the defective service, a federal court is void of jurisdiction to issue judgment against a defendant named in the complaint—even if the defendant may have actual notice of the lawsuit.” *Id.* (citing *Sieg v. Karnes*, 693 F.2d 803, 807 (8th Cir. 1982)). Defendants have not appeared or waived service.

In his affidavit, Rosberg attached the “green cards” showing defendants received his summons and complaint. Docket 16 at 2. The Eighth Circuit Court of Appeals has found this proof of service inadequate. *See Gulley v. Mayo Found.*, 886 F.2d 161, 165–66 (8th Cir. 1989) (holding that signing of the postal service “green card” was not sufficient to evidence acknowledgement of receipt of the summons and complaint and consequently did not satisfy Federal Rule of Civil Procedure 4). Therefore, the Court finds that Rosberg has not properly served defendants.

A defendant must be served within 90 days after the complaint is filed. Fed. R. Civ. P. 4(m). More than 90 days have now passed since Rosberg filed his complaint. Because Rosberg is a pro se litigant and made legitimate attempts to serve defendants, the Court grants him leave to properly serve defendants.

Rosberg may also move for leave to proceed in forma pauperis, if he is eligible. Under 28 U.S.C. § 1915(d), "for purposes of proceeding in forma pauperis, '[t]he officers of the court shall issue and serve all process, and perform all duties in such cases.' This language is compulsory." *Moore v. Jackson*, 123 F.3d 1082, 1085 (8th Cir. 1997) (citing *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 302 (1989)).

Therefore, it is

ORDERED that Rosberg must properly serve defendants or move for leave to proceed in forma pauperis by December 9, 2016. If Rosberg fails to do this, his case may be dismissed without further notice.

Dated November 14, 2016.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Lawrence L. Piersol", written over a horizontal line.

Lawrence L. Piersol
UNITED STATES DISTRICT JUDGE